No. 91-872

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Fed. R. Evid. 804(b)(1) authorizes admission against the government of the former testimony of a declarant who has been rendered unavailable by his assertion of his Fifth Amendment privilege, even though the government lacked any motive to cross-examine the declarant when the former testimony was given.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rules:

Rules—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 937 F.2d 797. The opinion of the district court (Pet. App. 42a-52a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1991. A petition for rehearing was denied on September 24, 1991. The petition for a writ of certiorari was filed on November 27, 1991, and was granted on January 21, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

FEDERAL RULE INVOLVED

Federal Rule of Evidence 804 provides, in pertinent part:

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant—

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

STATEMENT

1. On April 7, 1987, a grand jury sitting in the United States District Court for the Southern District of New York returned a 35-count indictment against 11 defendants, including respondents Anthony Salerno, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward Halloran, Alvin O. Chattin, and Aniello Migliore. The indictment charged respondents with participating in the affairs of a racketeering enterprise known as the Genovese Organized Crime Family of La Cosa Nostra, and conspiring to do so, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) and (d). Among the 41 predicate acts alleged to constitute the

pattern of racketeering activity were 16 predicate acts charging fraud in the construction industry. Other predicate acts charged respondents and four other defendants with fraud against the International Brotherhood of Teamsters, illegal payoffs, the attempted extortion of an individual, extortion and fraud in the food industry, participating in illegal numbers and bookmaking businesses, and loansharking. Pet. App. 6a-8a.

The trial began on April 6, 1987, and concluded 13 months later, on May 4, 1988. Much of the trial focused on the construction industry charges. The proof—based on extensive electronic surveillance and testimony by cooperating witnesses—showed that between 1980 and 1985 respondents endeavored to rig the bids for concrete superstructure work on virtually every high-rise building in Manhattan that used more than $2 million worth of concrete. Through its control over both construction unions and the supply of ready-mix concrete, the Genovese Family, acting in concert with other La Cosa Nostra families, created a "Club" of six concrete companies. In exchange for a payment of two percent of the contract price, the six companies were permitted to bid on large building jobs in Manhattan. The bids were rigged in accordance with an allocation of jobs by the Genovese Family and three other La Cosa Nostra families. Pet. App. 9a, 42a.

Prior to trial, pursuant to its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), the government informed respondents that Pasquale Bruno and Frederick DeMatteis had testified under immunity before the grand jury and might be sources of exculpatory testimony. Pet. App. 14a. The two were principals in the Cedar Park Concrete Construction Cor-

poration, which was alleged to be in the "Club." Before the grand jury, they had denied participating in or being aware of the Club scheme. Pet. App. 25a. During the trial, however, the government presented evidence that Cedar Park had been involved in the Club scheme and had ties to organized crime figures. Two other Club contractors testified that they had been informed by members of organized crime families active in the scheme that Cedar Park was a member of the Club. Tr. 6526-6528, 6561-6568, 8176-8177, 8324-8326. That testimony was corroborated by intercepted conversations among the conspirators and a document seized from a Genovese Family location, which indicated that the Family had a ten percent interest in Cedar Park. GX 429; GX 4100, at 4-5.

At trial, Bruno and DeMatteis appeared in response to defense subpoenas, but they invoked their Fifth Amendment privilege and refused to testify. Pet. App. 14a-15a. The government declined to immunize the two witnesses for purposes of trial, whereupon respondents asked that the witnesses' grand jury testimony be admitted under Fed. R. Evid. 804 (b)(1), the hearsay exception for prior testimony, or under Fed. R. Evid. 804(b)(5), the "catch-all" exception for unavailable declarants. In response, the government submitted sealed affidavits, in which it explained that it had "little or no incentive to conduct a thorough cross-examination of Grand Jury witnesses who appear to be falsifying their testimony to assist Grand Jury targets or other witnesses." Pet. App. 19a.

The district court accepted the government's explanation and denied respondents' request to admit the testimony; the court held that, because the government did not have the same motive to question the two witnesses before the grand jury that it would have had at trial, the grand jury testimony was not admissible under Rule 804(b)(1). Pet. App. 42a-52a. The court stated that the materials submitted by the government "seriously undercut the truthfulness of the grand jury testimony and explain why the prosecutor did not pursue the witnesses, by way of cross-examination, in the grand jury." Pet. App. 51a. The court also ruled that, because the grand jury testimony lacked a "circumstantial guarantee of trustworthiness," it was not sufficiently reliable to be admitted under Rule 804(b)(5). Tr. 18,319.

At the conclusion of trial, respondents were convicted on the RICO counts and the substantive charges arising out of the construction industry fraud. In addition, various defendants were convicted on counts charging labor payoffs, gambling, loansharking, and bid-rigging in the food industry.[1] Pursuant to the jury's verdict, the court then ordered the forfeiture of various defendants' interests in a number of assets, including large construction and concrete supply companies in New York City. Pet. App. 9a-11a.

2. The court of appeals reversed all of respondents' convictions, holding that the district court had erred by refusing to admit the Bruno and DeMatteis grand jury transcripts at trial. The court concluded that the grand jury testimony of the two witnesses was "former testimony" under Fed. R. Evid. 804 (b)(1), and that the witnesses—by virtue of their invocation of the Fifth Amendment privilege—were

[1] Individual defendants were acquitted of the gambling and loansharking charges, as well as the mail fraud charges involving the national elections for the International Brotherhood of Teamsters. Pet. App. 38a-39a.

"unavailable" to respondents within the meaning of Fed. R. Evid. 804(a)(1). The court then addressed a further prerequisite for admission of former testimony under Rule 804(b)(1)—that "the party against whom the testimony [was] offered" had a "similar motive to develop the testimony by direct, cross, or redirect examination." While agreeing "that the government may have had no motive before the grand jury to impeach the allegedly false testimony of Bruno and DeMatteis," Pet. App. 19a, the court held that "since these witnesses were available to the government at trial through a grant of immunity, the government's motive in examining the witnesses at the grand jury was irrelevant." Pet. App. 21a; see Pet. App. 24a. The court concluded: "Since the witnesses were only unilaterally 'unavailable' and could have been subjected to cross-examination by the government [at trial], we will not countenance the exclusion of their grand jury testimony on the ground of purported fairness to the government." Pet. App. 22a.

Having concluded that the district court erred in excluding the Bruno and DeMatteis grand jury testimony, the court of appeals ruled that, "[i]f this testimony had been believed, it is reasonably probable that the jury would have concluded either that no [concrete] 'club' existed, or at the very least that there was reasonable doubt as to its existence." Pet. App. 25a. The court therefore held that the error required reversal of the "Construction Case convictions." *Ibid.* Because it regarded the remaining counts and predicate acts as " 'barnacles' on the ship that was the Construction Case," the court reversed those convictions as well. *Ibid.*[2]

[2] The court of appeals found that respondent Auletta should have been permitted to introduce the government's jury arguments in a related prosecution in which Auletta was not a defendant. The court, however, did not base its reversal of Auletta's conviction on that ruling. Pet. App. 31a. The court also ruled that the limitations placed by the district court on cross-examination by defendant Ianniello deprived him of his right to present a defense and constituted reversible error. Pet. App. 26a-30a. Ianniello was not named in the construction charges, and the government has not sought review of the court of appeals' decision as to him.

3. After denying the government's petition for rehearing and suggestion for rehearing en banc, the court of appeals on November 6, 1991, modified its opinion (Pet. App. 40a-41a) by adding a single paragraph. The new portion of the opinion stated that the court had decided that "the testimony of Bruno and DeMatteis [was] available to the government but unavailable to the defendants." Pet. App. 41a. The court added that it had "not considered in this case, because the issue [was] not before us, whether the government's power to grant immunity would affect a declarant's 'availability' under any of the other subdivisions of Rule 804(b)." *Ibid.*

4. On November 20, 1991, the court issued an order modifying its previous denial of rehearing en banc to note that Judges Newman, Kearse, Mahoney, and Walker dissented from that denial. Pet. App. 55a-56a. In an opinion (Pet. App. 57a-60a) filed the same day, Judge Newman, joined by the three other dissenting judges, argued that the court's "unprecedented" (Pet. App. 57a) ruling in this case was "fraught with serious implications for the conduct of grand jury investigations." Pet. App. 60a. Speaking for his three colleagues, Judge Newman stated:

> Putting the Government to the unattractive choice of suffering the admission into evidence of

> uncross-examined hearsay that it believes is false or else obtaining the opportunity to cross-examine by conferring use immunity not only ignores the settled law in this Circuit and elsewhere on prior statements of witnesses who invoke the privilege against self-incrimination, but also undermines our consistent rulings refusing to impose on the Government an obligation to confer use immunity on defense witnesses.

Pet. App. 58a-59a. Judge Newman further noted that, despite the panel's disclaimer that it was not deciding any issues arising under hearsay exceptions other than the one created by Rule 804(b)(1), "the Government is entitled to be apprehensive that a ruling that a witness is 'available' to the prosecution because use immunity can be conferred might in the future be applied to determine 'availability' beyond Rule 804(b)(1)." Pet. App. 60a.

SUMMARY OF ARGUMENT

Federal Rule of Evidence 804(b)(1) provides that former testimony is admissible under that Rule if the party against whom it is offered had an "opportunity and similar motive" to develop the testimony in the prior proceeding. The district court in this case found that the government lacked such a motive. Far from disturbing that finding, the court of appeals agreed that, at the time the grand jury testimony at issue in this case was given, the government may have had no motive to impeach it. Accordingly, the testimony at issue failed to meet one of the express requirements of Rule 804(b)(1), and the court of appeals should have affirmed the district court's ruling that it was inadmissible under that Rule.

The court of appeals found the prior testimony admissible under Rule 804(b)(1) by holding that, when the declarant has invoked his Fifth Amendment privilege at trial, the requirement of similar motive is "irrelevant." In thus discarding an express requirement of Rule 804(b)(1), the court of appeals misunderstood the binding nature of the Federal Rules of Evidence. Congress enacted those rules into law and provided that they apply to civil and criminal proceedings in federal courts. Although a court may interpret ambiguous provisions of the Rules of Evidence, it may not simply ignore specific and unambiguous requirements of the Rules.

The court of appeals' rationale for holding the "similar motive" requirement to be "irrelevant" in the circumstances of this case does not withstand analysis. The court concluded that the declarants' grand jury testimony was admissible because the declarants were "available" to the government as witnesses at trial. The court reached that conclusion because the government had the power to immunize the declarants and thereby compel their testimony.

That reasoning is flawed in several respects. First, a witness who asserts his Fifth Amendment privilege and declines to testify is "unavailable" as a witness within the meaning of Rule 804. The definition of "unavailability as a witness" in Rule 804(a) extends to any witness who asserts a valid privilege. To hold that witnesses who invoke their Fifth Amendment privilege are nonetheless "available" to the government would alter settled understandings concerning each of the Rule 804(b) hearsay exceptions, since evidence is admissible under each of them only when the declarant is "unavailable as a witness." Second,

the conclusion that a witness is "available" to the opponent of proffered evidence does not in any event make the evidence admissible under Rule 804(b)(1) or any other exception to the hearsay rule. Finally, the court of appeals' ruling intrudes on the Executive Branch's exclusive power to immunize witnesses by unjustifiably requiring the government to choose between admitting untested and unimpeached prior testimony or granting immunity to a criminal defendant's associates and allies, thereby potentially impeding their subsequent prosecution.

ARGUMENT

GRAND JURY TESTIMONY MAY NOT BE ADMITTED AGAINST THE GOVERNMENT UNDER THE "FORMER TESTIMONY" EXCEPTION TO THE HEARSAY RULE IF THE GOVERNMENT LACKED A MOTIVE TO CROSS-EXAMINE THE DECLARANT BEFORE THE GRAND JURY

Rule 804(b)(1) provides that former testimony from an unavailable witness may be admitted over a hearsay objection if it satisfies several requirements: The declarant must be "unavailable as a witness"; he must have testified "as a witness at another hearing"; and the party against whom the testimony is offered must have "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Fed. R. Evid. 804(b)(1). The rule embodies the judgment that testimony satisfying those specific requirements will be sufficiently reliable to present to a jury in the witness's absence. See *Ohio* v. *Roberts*, 448 U.S. 56, 65-66 (1980).

We do not dispute that Bruno and DeMatteis testified "as witnesses," that their testimony before the grand jury constituted "testimony at another hearing," and that the United States—the "party against whom the testimony [was] offered"—had the "opportunity * * * to develop [their] testimony by direct, cross, or redirect examination" in the grand jury. We do, however, contend that they were "unavailable" as witnesses at trial and that the government did not have a "similar motive to develop the testimony" when it was given before the grand jury.

A. The Government Did Not Have A "Similar Motive" To Develop The Grand Jury Testimony Before The Grand Jury.

For several reasons, the government typically does not have the same motive to cross-examine hostile witnesses in the grand jury that it has to cross-examine them at trial. That is particularly true in a case such as this one, involving a lengthy and complex grand jury investigation in which the prosecutor must exercise special care to protect the integrity and confidentiality of the investigation.

First, the government's examination of witnesses before a grand jury is affected by the need to maintain the security of the grand jury proceeding, a motive entirely distinct from any motive that the government ordinarily has at trial. This Court has recognized that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Butterworth* v. *Smith*, 494 U.S. 624, 630 (1990) (quoting *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218 (1979)). To confront a witness suspected of perjury in the grand jury with all of the evidence against him threatens to expose

the status of the investigation at the time of the testimony, including the identities of informants, the scope of physical and electronic surveillance in connection with the investigation, and the nature of other investigative techniques being employed.

In particular, confronting the witness may reveal information gleaned from other grand jury witnesses who may have agreed to testify in spite of fears of reprisal. If the government exposes the extent of its knowledge to an individual who, by his willingness to commit perjury, has shown himself to be allied with the investigation's targets, the effect may be to provide information to the targets that can be used to threaten witnesses, destroy evidence, fabricate a defense, or otherwise obstruct the investigation. The government may thus have the least motive to challenge testimony of a grand jury witness in cases in which the government is most certain that the witness has perjured himself. For example, where the prosecutor knows that the grand jury will have the opportunity to hear or see tapes that directly contradict a witness's testimony, the prosecutor would have little to gain by confronting the witness with those tapes to demonstrate the perjury and much to lose by exposing the use of electronic surveillance to the targets of the investigation.[3]

Second, in the grand jury setting the government ordinarily has little incentive to discredit a perju-

[3] The government's normal concern for protecting the secrecy of a grand jury investigation was particularly acute here, given that the attorney who had a longstanding relationship with defendant Vincent DiNapoli—a member of the Genovese Family—and who later served as DiNapoli's counsel in this trial, had met with Bruno and provided him with legal advice relating to this case prior to Bruno's appearance before the grand jury. Mar. 12, 1987, Tr. 4-20.

rious witness with a vigorous, on-the-spot examination. By simply excusing the witness and continuing the grand jury's investigation, the government retains the options of prosecuting the witness for perjury, or recalling the witness for further examination when the investigation produces more evidence with which to confront him.

Third, the issues before the grand jury at the time a witness has testified will not necessarily be the same as those presented during the trial on an indictment handed down by that grand jury.[4] The grand jury does not conduct an "adversary hearing in which the guilt or innocence of the accused is adjudicated." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). Its function "is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred." *United States* v. *R.*

[4] Respondents' suggestion (Br. in Opp. 13.) that " 'similar motive' is irrelevant, provided the issues in the former proceeding and the present one are substantially identical" was expressly rejected by the Advisory Committee when it drafted Rule 804(b)(1). Cross-examination or similar ability to develop the prior testimony is the key factor rendering such testimony admissible. Therefore, where there has been no such development—as was the case here—"[t]he opportunity must have been such as to render * * * the decision not to cross-examine meaningful in the light of the circumstances which prevail when the former testimony is offered." E. Cleary, *McCormick on Evidence* § 255, at 761-762 (3d ed. 1984). The Advisory Committee specifically determined that those "circumstances" went beyond the mere identity of the issues in the prior proceeding: "Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness expressing the matter in the latter terms is preferable." Notes of Advisory Committee on 1972 Proposed Rules, 28 U.S.C. at 789.

Enterprises, Inc., 111 S. Ct. 722, 726 (1991). Thus, while the ultimate issue before the grand jury is whether there is probable cause to believe that a crime has been committed, the scope and nature of the crime and the identities of the potential participants may well not have crystallized at the time a particular witness testifies before the grand jury.[5]

On the basis of these considerations, the district court held that "the motive of a prosecutor in questioning a witness before the grand jury in the investigatory stages of a case is far different from the motive of a prosecutor in conducting the trial." Pet. App. 51a. In addition, with respect to the government's motives in this case, the district court found that the materials placed under seal "seriously undercut the truthfulness of the grand jury testimony and explain why the prosecutor did not pursue the witnesses, by way of cross-examination, in the grand jury." *Ibid.* Accordingly, the district court correctly held the evidence inadmissible under Rule 804(b)(1).

[5] We do not suggest that grand jury testimony will never be admissible against the government under Rule 804(b)(1). The factors that demonstrate the government's lack of motive to develop the grand jury testimony in this case will, however, be generally applicable and will lead to the same conclusion of lack of motive in other cases in which a defendant seeks the admission of grand jury testimony against the government under Rule 804(b)(1). Accordingly, as one recent commentary has suggested, absent "a special showing that the government conducted a full grand jury interrogation," grand jury testimony should not be admissible against the government under Rule 804(b)(1). 2 S. Saltzburg & M. Martin, *Federal Rules of Evidence Manual* 410 (5th ed. 1990). Cf. *Commonwealth* v. *Martinez*, 425 N.E.2d 300, 304-305 (Mass. 1981) (interpreting identical language of Massachusetts Rules of Evidence). In appropriate circumstances, however, grand jury testimony may be admissible under the residual hearsay exception, Fed. R. Evid. 804(b)(5).

The court of appeals did not overturn the district court's finding that the government lacked a similar motive to cross-examine the witnesses before the grand jury. Instead, the court of appeals "agree[d]" with the district court "that the government may have had no motive before the grand jury to impeach the allegedly false testimony of Bruno and DeMatteis." Pet. App. 19a. Having reached that conclusion, the court should have applied the plain language of Rule 804(b)(1) and affirmed the district court's ruling that the grand jury testimony of Bruno and DeMatteis was inadmissible under that Rule.

B. The "Similar Motive" Requirement Of Rule 804(b)(1) Is "Relevant" Whenever A Criminal Defendant Seeks To Introduce Grand Jury Testimony Under That Rule.

The court of appeals held that the similar motive requirement of Rule 804(b)(1) is "irrelevant," Pet. App. 21a, 24a, or "evaporates," Pet. App. 21a, in circumstances such as those in this case. The court therefore held that the prior testimony was admissible and that its exclusion was reversible error. That holding reflects a fundamental misapprehension of the legal status of the Federal Rules of Evidence.

Although Congress debated the wisdom of codifying evidentiary rules, it settled that debate in 1975 by enacting the Federal Rules of Evidence—including Rule 804(b)(1) in substantially its present form. Pub. L. No. 93-595, 88 Stat. 1926.[6] See generally 4

[6] Unlike the Federal Rules of Civil and Criminal Procedure, which originally went into effect a specified period of time after their transmission to Congress, the Federal Rules of Evidence were enacted by Congress. See 28 U.S.C. 723b, 723c (1934) (governing promulgation of Federal Rules of

J. Bailey III & O. Trelles II, *Federal Rules of Evidence: Legislative Histories and Related Documents* (1980). Rule 101 of the Federal Rules of Evidence provides that "[t]hese rules govern proceedings in the courts of the United States * * *, to the extent and with the exceptions stated in Rule 1101." 88 Stat. 1929. Accordingly, the Rules of Evidence apply to criminal proceedings in federal district courts, and the particular terms of the Rules are binding on federal courts in considering evidentiary questions. Cf. *Palermo* v. *United States*, 360 U.S. 343, 353-354 n.11 (1959). That should be "the end of the matter." *Bourjaily* v. *United States*, 483 U.S. 171, 178 (1987).

To be sure, federal courts have substantial authority to determine how the specific provisions of the Rules apply to specific cases. That includes authority to make necessary factual determinations required by the Rules, as the district court did in this case when it determined that the government did not have a "similar motive" to develop the testimony of Bruno and DeMatteis before the grand jury. It also includes authority to interpret ambiguous provisions of the Rules in particular cases. It does not, however, include authority to refuse to apply provisions of the Rules simply because the court is unhappy with the

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Civil Procedure), 18 U.S.C. 687, 689 (1940) (governing promulgation of Federal Rules of Criminal Procedure); Pub. L. No. 93-12, 87 Stat. 9 (providing that proposed Rules of Evidence "shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress"); Pub. L. No. 93-595, 88 Stat. 1926 (enacting Federal Rules of Evidence). The promulgation of federal rules of civil and criminal procedure and rules of evidence is currently governed by 28 U.S.C. 2071-2074.

result to which a particular application would lead. "Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided." *Commissioner* v. *Asphalt Products Co.*, 482 U.S. 117, 121 (1987) (per curiam); see also *Thomas* v. *Arn*, 474 U.S. 140, 148 (1985); *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 152 (1984) (per curiam). As this Court has remarked of Rule 52(a) of the Federal Rules of Criminal Procedure, Rule 804(b)(1) "is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988).

The untoward consequences of permitting a court simply to disregard controlling provisions of the Federal Rules of Evidence are illustrated by this case. Respondents attempted to introduce the grand jury testimony of Bruno and DeMatteis not only under Rule 804(b)(1), but also under Rule 804(b)(5), the residual exception for hearsay statements in which the declarant is unavailable as a witness at trial. The trial court specifically found that the testimony lacked the "circumstantial guarantee of trustworthiness" required by Rule 804(b)(5), see Pet. App. 51a, a finding that was not disturbed by the court of appeals.[7] See also Pet. App. 52a ("there is

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[7] Most cases addressing the admissibility of grand jury testimony at trial when the declarant is unavailable have measured the proffered testimony against the more flexible standard of Rule 804(b)(5), rather than against the specific requirements of Rule 804(b)(1). Compare *United States*

no adequate guarantee of reliability of the grand jury testimony to justify its placement before this jury"). The result of the court of appeals' decision is thus that respondents' convictions must be reversed because the district court excluded former testimony that the government had no motive to develop when it was given and that was otherwise lacking in any circumstantial guarantee of trustworthiness. That result flies in the face of the central assumption underlying the hearsay rule: that hearsay evidence is presumptively inadmissible unless given in circumstances that attest to its reliability, either as provided for in the specific hearsay exceptions or as found by a trial court under the residual hearsay exceptions. See Notes of Advisory Committee on 1972 Proposed Rules, 28 U.S.C. at 771.

In departing from the requirements of the Rule, the court of appeals provided no limiting principle. Indeed, the court appeared to regard itself as free to dispense with not only the "similar motive" requirement of Rule 804(b)(1), but the "opportunity" requirement as well. Thus, the court stated that the testimony of Bruno and DeMatteis "was former

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v. *Panzardi-Lespier*, 918 F.2d 313, 316-317 (1st Cir. 1990) (holding evidence admissible); *United States* v. *Snyder*, 872 F.2d 1351 1354-1355 (7th Cir. 1989) (same); *United States* v. *Curro*, 847 F.2d 325, 327 (6th Cir.) (same), cert. denied, 488 U.S. 843 (1988); *United States* v. *Carlson*, 547 F.2d 1346, 1353-1355 (8th Cir. 1976) (same), cert. denied, 431 U.S. 914 (1977); *United States* v. *Murphy*, 696 F.2d 282, 286 (4th Cir. 1982) (same), cert. denied, 461 U.S. 945 (1983), with *United States* v. *Fernandez*, 892 F.2d 976, 980-984 (11th Cir. 1989) (holding testimony inadmissible under residual exception), cert. dismissed, 495 U.S. 944 (1990); *United States* v. *Gonzalez*, 559 F.2d 1271, 1273-1274 (5th Cir. 1977) (same).

testimony given by a declarant unavailable to the defendants, and the *opportunity and similar motive* to develop the testimony in front of the grand jury is irrelevant, because the declarants were not similarly unavailable to the government at trial." Pet. App. 24a (emphasis added). If the opportunity and motive to develop the testimony in the prior proceeding are "irrelevant," it is difficult to see why the opponent's status as a party in the prior proceeding—clearly a requirement of Rule 804(b)(1)—should be essential to a ruling that the prior testimony is admissible.[8]

In short, the court of appeals' interpretation threatens to convert Rule 804(b)(1), which was enacted by Congress as a limited exception to the hearsay rule, into a general license for admitting, at the behest of a criminal defendant, former testimony given in any proceeding by any witness who asserts his Fifth Amendment privilege at trial. Moreover, because there is no place in the court of appeals' analysis for consideration of the reliability of the former testimony, the court of appeals' interpretation would require that the evidence be admitted even if there is substantial reason to believe that it is unreliable and nothing at all to support its credibility.

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[8] The "party" requirement has uniformly been respected by the lower courts. See, *e.g.*, *United States* v. *North*, 910 F.2d 843, 906-907 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 2235 (1991); *United States* v. *McDonald*, 837 F.2d 1287, 1291-1293 (5th Cir. 1988); *United States* v. *Kapnison*, 743 F.2d 1450, 1458-1459 (10th Cir. 1984), cert. denied, 471 U.S. 1015 (1985).

C. The Court Of Appeals Erred In Holding That Bruno And DeMatteis Were "Available" To The Government When They Invoked Their Fifth Amendment Privilege At Trial

The court of appeals based its decision to dispense with the "similar motive" requirement of Rule 804(b)(1) on its determination that "[t]he 'similar motive' requirement * * * protects the party to whom the witness is 'unavailable' in order to accord that party some degree of adversarial fairness." Pet. App. 20a. In the court's view, Bruno and DeMatteis were "available" to the government through the use of its immunity powers. See Pet. App. 17a, 41a. The court concluded that, "[s]ince the witnesses were only unilaterally 'unavailable' and could have been subjected to cross-examination by the government," the court would not "countenance the exclusion of their grand jury testimony on the ground of purported fairness to the government." Pet. App. 22a.[9]

Even if the court of appeals had authority to hold an express provision of the Federal Rules of Evidence "irrelevant," the court of appeals' decision to exercise that authority in this case would have been mistaken, for several reasons. First, the conclusion that Bruno and DeMatteis were "available" to the government was incorrect. Rule 804(a) makes clear that a witness who invokes the Fifth Amendment privilege against compulsory self-incrimination is "unavail-

[9] In a subsequent case, *United States* v. *Bahadar*, No. 91-1263 (Jan. 22, 1992), the Second Circuit explained that "the 'similar motive' requirement is bottomed on rule 804(b)(1)'s overall goal of preserving adversarial fairness," which "was neither needed nor intended in a situation where the government itself created the testimony in the first instance and where it, alone, could compel live testimony from the same witnesses at trial." Slip op. 1236.

able" for purposes of the Rule 804(b) hearsay exceptions. Second, even if Bruno and DeMatteis can be said to have been "available" to the government, their grand jury testimony would still be inadmissible, as neither Rule 804(b)(1) nor any other hearsay exception authorizes the admission of out-of-court testimony simply because the opponent of the evidence has it within its power to force the declarant to testify. Finally, requiring the admission against the government of out-of-court statements by declarants who assert their Fifth Amendment privilege and whom the government declines to immunize, threatens improper judicial interference with the prosecution's decision whether to grant immunity to a witness.[10]

1. There is no legal basis for the court of appeals' conclusion that the declarants were available to the government for purposes of Rule 804. Rule 804(a)(1) defines "unavailability as a witness" to encompass cases in which a declarant "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declar-

[10] While the court of appeals expressly declined to base its ruling on *Brady* v. *Maryland*, 373 U.S. 83 (1963), it suggested that the government's refusal to acquiesce in the admission of Bruno and DeMatteis's grand jury testimony might have violated its obligations under the *Brady* doctrine. Pet. App. 22a. That suggestion misreads the principles of *Brady* and its progeny. While *Brady* requires the government to alert defendants to potential sources of exculpatory evidence known only to the government, it does not make otherwise inadmissible evidence admissible. Cf. *United States* v. *Nobles*, 422 U.S. 225, 241 (1975) (Constitution does not give defendant right to present evidence free from legitimate demands of adversary system).

ant's statement." Neither that definition nor any other provisions of the Federal Rules of Evidence suggests that there is or ought to be any distinction between availability to the proponent of hearsay evidence and availability to the opponent. Nor would there be any basis for treating unavailability due to assertion of a Fifth Amendment privilege differently from unavailability due to other causes. As the court of appeals acknowledged, the Second Circuit itself has "long recognized that 'unavailability' includes within its scope those witnesses who are called to testify but refuse based on a valid assertion of their fifth amendment privilege against self-incrimination." Pet. App. 16a. Numerous other courts have similarly so held. See, *e.g.*, *United States* v. *Boyce*, 849 F.2d 833, 836 & n.2 (3d Cir. 1988); *United States* v. *Silverstein*, 732 F.2d 1338, 1346 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Zurosky*, 614 F.2d 779, 792 (1st Cir. 1979), cert. denied, 446 U.S. 967 (1980); *Witham* v. *Mabry*, 596 F.2d 293, 297 (8th Cir. 1979); see also Notes of Advisory Committee on 1972 Proposed Rules, 28 U.S.C. at 788 ("Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony).").

To accept the court of appeals' conclusion that Bruno and DeMatteis were "available" to the government would upset the settled understanding of the concept of "availability" under all of the Rule 804(b) hearsay exceptions. For example, until the decision in this case, courts uniformly understood Rule 804(b)(3) to permit the government to introduce statements against penal interest upon a showing that the

declarant has been rendered "unavailable" by an invocation of the Fifth Amendment and that the other requirements of Rule 804(b)(3) have been met. See, *e.g.*, *United States* v. *Garcia*, 897 F.2d 1413, 1420-1421 (7th Cir. 1990); *United States* v. *Boyce*, 849 F.2d 833, 835-837 (3d Cir. 1988); *United States* v. *Briscoe*, 742 F.2d 842, 846-847 (5th Cir. 1984); see also *United States* v. *Williams*, 927 F.2d 95, 98-99 (2d Cir.), cert. denied, 112 S. Ct. 307 (1991); *United States* v. *Winley*, 638 F.2d 560, 562 (2d Cir. 1981), cert. denied, 455 U.S. 959 (1982). In none of those cases was the government's ability to make a declarant "available" through a grant of immunity found to have any impact on the admissibility of the evidence. Yet, under the Second Circuit's reasoning in this case, the government would be unable to introduce statements against interest under Rule 804(b)(3) if the government could make the declarant testify at trial by granting him immunity.[11]

It is no answer to state, as the court of appeals did in the November 6 amendment to its opinion, that it had not "considered * * * whether the government's power to grant immunity would affect a declarant's 'availability' under any of the other subdivisions of Rule 804(b)." Pet. App. 41a. The court's suggestion that "unavailability" may mean one thing for Rule 804(b)(1) and another thing for the other Rule

[11] The court's reasoning would apparently require the same result in the case of the less frequently employed exceptions for statements made under belief of impending death (Fed. R. Evid. 804(b)(2)) and statements of personal or family history (Fed. R. Evid. 804(b)(4)). In addition, since the government's authority to immunize witnesses extends to civil cases, see 18 U.S.C. 6002, the court of appeals' reasoning would also apply in civil cases in which the government is a party.

804(b) exceptions simply demonstrates that the court of appeals regarded the concept of unavailability as a fluid one that could be molded differently for different factual settings. That concept, however, is squarely at odds with the plain terms of the Rule.

The term "unavailability as a witness" is defined once in the Federal Rules of Evidence, in Rule 804(a), and is used once in the Federal Rules of Evidence, in the sentence in Rule 804(b) stating the prerequisite for all the Rule 804(b) hearsay exceptions. There is no basis in the text of Rule 804, or in the reported decisions applying that Rule, to modify the definition of "unavailability" depending on which Rule 804(b) hearsay exception is at issue. In addition, although former testimony may be more reliable than some other forms of hearsay, what renders it reliable is either actual cross-examination or a meaningful opportunity to cross-examine. Absent either of those factors, the mere fact that the declarant was under oath in the prior proceeding and subject to a perjury prosecution is insufficient to justify relaxation of the hearsay rule. See *United States* v. *Feldman*, 761 F.2d 380, 385 (7th Cir. 1985) ("Mere 'naked opportunity' to cross-examine is not enough; there must also be a perceived 'real need or incentive to thoroughly cross-examine' at the time of the [prior testimony]."") (quoting *United States* v. *Franklin*, 235 F. Supp. 338, 341 (D.D.C. 1964)); *United States* v. *Pizarro*, 717 F.2d 336, 349 (7th Cir. 1983); *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1251-1252 (E.D. Pa. 1980), modified, 723 F.2d 238 (3d Cir. 1983), rev'd on other grounds, 475 U.S. 574 (1986). See also *United States* v. *Fernandez*, 892 F.2d 976, 981 (11th Cir. 1989), cert. dismissed, 495 U.S. 944 (1990); *United States* v. *Snyder*, 872 F.2d 1351, 1355-1357 (7th Cir. 1989) (applying Rule 804(b)(5)).

In short, the court of appeals' holding that Bruno and DeMatteis were "available" to the government, notwithstanding their invocation of the Fifth Amendment privilege, has no support in the text or rationale of Rule 804.

2. Even if Bruno and DeMatteis could be said to be "available" to the government because of the government's power to immunize them and compel their testimony, that would not justify admitting their grand jury testimony at trial. There is no general hearsay exception applicable to out-of-court statements by declarants who are "available" to one of the parties. In particular, Rule 804(b)(1) has no special provision authorizing the admission of prior testimony of declarants who are "available" to the opponent of the testimony. If the other requirements of the Rule—including the "similar opportunity and motive" requirement—are not satisfied, the evidence is inadmissible regardless of whether the declarant can be made "available" by one of the parties.

Prior to this case, when defendants have sought to introduce prior testimony under Rule 804(b)(1) by a declarant rendered "unavailable" by his assertion of the Fifth Amendment privilege and given during proceedings at which the government lacked a sufficient motive to probe the declarant's statements, courts have consistently barred admission of the prior testimony under that rule. See, *e.g.*, *United States* v. *Powell*, 894 F.2d 895, 901 (7th Cir.) (upholding trial court's refusal to permit defendant to introduce his co-defendant's guilty plea allocution, reasoning that

the government lacks "the same motive [to examine the declarant] at a plea hearing as it does at other proceedings"), cert. denied, 110 S. Ct. 2189 (1990); *United States* v. *Serna*, 799 F.2d 842, 849 (2d Cir. 1986) (testimony of severed co-defendant in prior trial properly excluded because government lacked "an opportunity and similar motive to cross-examine the witness at the previous trial"); cert. denied, 481 U.S. 1013 (1987); *United States* v. *Lowell*, 649 F.2d 950, 965 (3d Cir. 1981) (same); *United States* v. *Atkins*, 618 F.2d 366, 373 (5th Cir. 1980) (affirming trial court's ruling that defendant could not introduce a co-defendant's testimony at pretrial hearing because the government lacked motive to cross-examine co-defendant at that hearing on relevant issue); see also *United States* v. *North*, 910 F.2d 843, 906-908 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 2235 (1991). Those courts have correctly applied the Rules of Evidence, which make no provision for the admission of prior testimony against the government simply because the government has the power to force the declarant to testify at trial.

3. Finally, to hold that declarants who invoke their Fifth Amendment privilege at trial are "available" to the government, and that their prior testimony should therefore be admissible, would introduce into the application of the Rule 804(b) hearsay exceptions an improper bias in favor of criminal defendants and other parties litigating against the government. The government's power to immunize—a special power entrusted by statute to the Executive "to secure relevant testimony," *Earl* v. *United States*, 361 F.2d 531, 534 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967)—would be converted into a peculiar handicap, authorizing the admission of evi-

dence that would not be admissible on behalf of the government or a private party in a private civil suit. The Executive Branch should not be forced to grant immunity to a defendant's confederates as the price of having the rules of evidence applied according to their terms. See *United States* v. *Georgia Waste Systems, Inc.*, 731 F.2d 1580, 1582 (11th Cir. 1984); *United States* v. *Weiner*, 578 F.2d 757, 771 & n.12 (9th Cir. 1978); *United States* v. *Lang*, 589 F.2d 92, 95-97 (2d Cir. 1978).[12]

As Judge Newman noted in his dissent from the denial of rehearing en banc in this case, "[p]utting the Government to the unattractive choice of suffering the admission into evidence of uncross-examined hearsay that it believes is false or else obtaining the opportunity to cross-examine by conferring use im-

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[12] The Second Circuit's creation of an immunity exception to the definition of "unavailability" is also inconsistent with well-settled law that, when a potential witness has asserted his Fifth Amendment privilege, the defendant is not entitled to a "missing witness" instruction licensing the inference that the potential witness's testimony would be adverse to the government. That rule is based on the premise that a potential witness who has asserted his Fifth Amendment privilege is equally unavailable to both parties, regardless of the fact that the government has the power to grant him immunity and thus to make him "available." See *United States* v. *St. Michael's Credit Union*, 880 F.2d 579, 597-599 (1st Cir. 1989); *United States* v. *Brutzman*, 731 F.2d 1449, 1453-1454 (9th Cir. 1984); *United States* v. *Flomenhoft*, 714 F.2d 708, 713-714 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984); *United States* v. *Simmons*, 663 F.2d 107, 108 (D.C. Cir. 1979); *United States* v. *Stulga*, 584 F.2d 142, 145-146 (6th Cir. 1978); *United States* v. *Chapman*, 435 F.2d 1245, 1247-1248 (5th Cir. 1970), cert. denied, 402 U.S. 912 (1971). See generally *Graves* v. *United States*, 150 U.S. 118, 121 (1893); L. Sand, *et al.*, *Modern Federal Jury Instructions* ¶ 6.04, at 6-16, 6-20 (1991).

munity * * * undermines [the Second Circuit's] consistent rulings refusing to impose on the Government an obligation to confer use immunity on defense witnesses." Pet. App. 58a-59a (citing *United States* v. *Pinto*, 850 F.2d 927, 935 (2d Cir.), cert. denied, 488 U.S. 867 (1988); *United States* v. *Turkish*, 623 F.2d 769, 772-774 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981)). Those rulings are, of course, not limited to the Second Circuit. See, *e.g.*, *United States* v. *Mitchell*, 886 F.2d 667, 669-670 (4th Cir. 1989); *United States* v. *Doddington*, 822 F.2d 818, 821 & n.1 (8th Cir. 1987); *United States* v. *Williams*, 809 F.2d 1072, 1083 (5th Cir.), cert. denied, 484 U.S. 896 (1987); *United States* v. *Sawyer*, 799 F.2d 1494, 1506-1507 (11th Cir. 1986), cert. denied, 479 U.S. 1069 (1987). And the Second Circuit itself has cogently summarized the rationale for such judicial restraint:

> In addition to ensuring that prosecutorial decisions concerning whom to prosecute and what evidence to present at a criminal trial will not be lightly interfered with by the judiciary, it reduces the possibility of cooperative perjury between the defendant and his witness. A person suspected of crime should not be empowered to give his confederates an immunity bath.

Blissett v. *LeFevre*, 924 F.2d 434, 441-442 (internal quotation marks omitted), cert. denied, 112 S. Ct. 158 (1991).

Even when the government has found it necessary to immunize witnesses in the grand jury—as it did here—it should not be forced to permit defendants who may have conspired with those witnesses to engineer a broader grant of immunity at trial that would erect a substantial roadblock in the way of any

effort to prosecute those witnesses for their grand jury perjury or for any other crimes disclosed by their trial testimony. In the grand jury, the government can carefully limit its questioning to matters critical to its investigation; it can terminate the questioning at any point; and it can protect the secrecy of the proceedings. The government can thereby limit both the scope of a grant of immunity for grand jury testimony and the burden the government would have to carry to show that any subsequent prosecution was not "tainted" by the immunized evidence. See, *e.g.*, *Kastigar* v. *United States*, 406 U.S. 441 (1972). At trial, however, the examination and cross-examination of immunized witnesses is not subject to similar control and may result in an effective "immunity bath" for witnesses who could otherwise face separate prosecutions. In suggesting that "the government *made* Bruno and DeMatteis unavailable to the defense by refusing to immunize them at trial," Pet. App. 23a (emphasis added), the court of appeals ignored those considerations, as well as the fact that it was the witnesses' own fear of prosecution—quite possibly for perjury before the grand jury—that rendered them "unavailable." See *United States* v. *Chagra*, 669 F.2d 241, 260 (5th Cir. 1982) ("the government's refusal to remove an obstacle in the defendant's path simply cannot be equated with the government's placement of a barrier in the defendant's way").

* * * * *

In sum, the court of appeals ignored the requirements of Rule 804 in two critical respects. First, it refused to apply the express requirement of the Rule that the opponent of the proffered evidence must have had a "similar motive and opportunity" to cross-

examine at the time the former testimony was given. Second, it refused to apply the Rule's definition of "unavailability" according to its terms. Together, those two legal errors led the court to require the admission of evidence that was not given from the stand at trial, had not been tested by cross-examination, and was specifically found by the district court to lack circumstantial guarantees of trustworthiness. The court of appeals' ruling therefore not only violated the Rules of Evidence, but also disserved the very notions of fairness that the court invoked to support its novel ruling.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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